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No. 94-66 and No. 94-82

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

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MIKE MOORE, *et al.*,

*Appellants,*

v.

JOHNNY DUPREE, *et al.*,

*Appellees.*

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THE LAMAR COUNTY BOARD OF EDUCATION AND TRUSTEES, *et al.*,

*Appellants,*

v.

JOHNNY DUPREE, *et al.*,

*Appellees.*

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**On Appeal from the United States District Court for the Southern District of Mississippi**

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## SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO AFFIRM

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**SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO AFFIRM**

## I. Introduction

In its brief, Amicus Curiae United States urges remand of this case to address the question of the severability of the non-voting aspects of Miss. Code Ann. § 37-7-611 from the voting aspects of the statute. U.S. Br. at 19. The United States presumes the District Court failed to consider the specific arguments made by the parties regarding the appropriate remedy for the State's violation of the Voting Rights Act. Remand is unnecessary because this issue has already been presented to the District Court, although not in precisely the same form suggested by the United States.[1]

## II. In The District Court, The Appellants Argued That The Court's Remedy Should Be Limited To The Voting Aspects Of Section 37-7-611.

In Dupree II, the District Court held that "[t]he repealer of Miss. Code Ann. § 37-7-611 is hereby found to be ineffective and unenforceable." J.S. App. 37a. In a Rule 59 motion, the Appellants requested the District Court to limit its remedy to the voting features of § 37-7-611 and not disturb the non-voting features of the statute. In response, the Appellees pointed out that, if the District Court did not hold

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[1] The issue actually posed to the United States by the Court concerned the effect of the Mississippi Supreme Court's decision in Greenville Public Sch. Dist. vs. Western Line Consol. Sch. Dist., 575 So. 2d 956 (Miss. 1990), cert. denied, 112 S. Ct. 1512 (1991), on the District Court's ability to fashion a remedy for the State's violation of the Voting Rights Act. The United States' position on that issue is unequivocal: "Greenville Public School District has no effect on the remedy that the federal court may order in this case." U.S. Br. at 15.

the entire statute ineffective, the remedy would be inconsistent with the purposes of the Voting Rights Act. If the entire statute is not ineffective, newly annexed city residents would be precluded from voting in county school board elections, even though they reside in the county school district, send their children to county schools and pay taxes to support the county schools in an amount determined by the county school board.

The United States characterized this potential remedy as "highly unusual" and "sufficiently anomalous" that the state legislature may not have intended it. U.S. Br. at 19. Thus, the United States acknowledged the "strong argument that the non-voting aspects of the repeal of [§ 37-7-611] are not sensibly severable from the voting change effected by that repeal." Id. at 18. As a result, the United States concluded that the District Court's remedial order "may well have been correct." Id. at 19. A review of the parties' positions in the District Court reveals that the substantive issue that would be addressed on remand was actually before the District Court.

Prior to the District Court's August 1993 decision in Dupree II, the State of Mississippi raised the remedy issue in the event that court held that the State failed to receive preclearance of the repeal of § 37-7-611. Citing Dotson vs. City of Indianola, 514 F. Supp. 397 (N.D. Miss. 1981), aff'd mem., 456 U.S. 1002 (1982), the State argued that "only the election features of the statute should be enjoined." State Defendants' Brief on Remand (filed June 17, 1992) at 3.[2] The State asserted that the "ultimate relief" sought by the Appellees is "the establishment of their entitlement to territory for taxation purposes and an increase in student enrollment.

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[2] The United States also cited Dotson in its brief. U.S. Br. at 16.

The state defendants submit that relief of this sort will not flow from any finding of a Section 5 violation herein." Id.

The State previously made this same argument during the preclearance process. In denying the State's request for reconsideration of his objection to the repeal of § 37-7-611, the Attorney General specifically rejected the State's position "that the changes in the procedure for extending municipal school district boundaries do not have any racial aspect but rather simply reflect an ongoing contest among school districts for students and tax base." J.S. App. 219a. The Attorney General affirmed his earlier conclusion that "the repeal of [§ 37-7-611] will essentially freeze municipal school districts in their present boundaries, which, in many instances," will have racial implications regarding the population of school districts. Id. The suggested remedy advanced by the Appellants is totally at odds with the express position of the Justice Department. In addition, their proposed remedy is likely unconstitutional. See Kramer vs. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969) (cited in U.S. Br. at 18 n.9.).

After the District Court issued Dupree II, the Appellants filed a Joint Motion for Remedy. Citing Dotson again, the Appellants argued:

> [T]he appropriate remedy under Section 5 of the Voting Rights Act of 1964 is limited to a voting remedy, i.e, the school districts' boundaries remain where they are and have been, but the persons annexed may not change their manner of voting. That is, the school districts would remain where they are, but the citizens annexed in

> Lamar County and Forrest County would not be allowed to vote for the County School Boards.

J.S. App. 235a. In reply to this Joint Motion, the Appellees stated that the District Court's remedy -- the repealer of § 37-7-611 is ineffective and unenforceable -- is consistent with this Court's precedent. Plaintiffs' Reply to Defendants' Joint Motion for Remedy (filed Sept. 29, 1993) at 2-3; see Clark vs. Roemer, 500 U.S. 646, 652-53 (1991) ("If voting changes subject to § 5 have not been precleared, § 5 plaintiffs are entitled to an injunction prohibiting the State from implementing the changes."); NAACP vs. Hampton County Election Comm'n, 470 U.S. 166, 175 n.19 (1985) ("[S]tatutes that are subject to § 5 are ineffective as laws until they have been cleared by federal authorities."). Addressing the Appellants' contention that residents of the county school district be precluded from voting in county school board elections, the Appellees raised exactly the same points that led the United States to label as "highly unusual" the remedy proposed by the Appellants. Plaintiffs' Reply Memorandum at 3.

In addition, the Appellees noted that the Appellants' proposed remedy did not resolve the basis for the objection of the Attorney General to the repeal of § 37-7-611. The newly annexed city residents would remain residents of the county school district but elect indirectly the board members of the city school district by voting in city elections. Id. at 3-4. The Appellants' proposed remedy would, in effect, veto the Attorney General's objection to the repeal of § 37-7-611 and achieve indirectly what could not be achieved directly.

In its rebuttal brief in support of the Joint Motion for Remedy, Appellant Forrest County School District requested

that the District Court "fashion a remedy which alleviates the voting concerns, but which also allows the non-voting legislative objectives . . . to be enforced by this Court and others." Forrest County School District's Rebuttal Memorandum in Support of the Defendants' Joint Motion for Remedy, Joint Motion for a New Trial, or to Alter or Amend Order and Joint Motion for a Stay Pending Appeal (filed Oct. 15, 1993) at 10 [Forrest County Rebuttal Memorandum]. Appellant Lamar County School District echoed this argument: "[T]he proper remedy is an effect on voting, not an effect on the political boundaries of the school system." Lamar County Rebuttal Memorandum (filed Oct. 22, 1993) at 4.

Forrest County also noted the "two possible voting remedy scenarios." Forrest County Rebuttal Memorandum at 9-10. Under one scenario, the boundaries of the school districts would remain the same and newly annexed city residents would be precluded from voting in county school board elections. Under the other scenario, the school district boundaries would not change and the annexed residents would be precluded from voting in city elections. Id. The Appellees pointed out that "under either scenario, the newly annexed residents would be prevented from voting for officeholders who could impose taxes directly on those residents." Plaintiffs' Reply to Defendants' Joint Motion for Remedy at 3.

## III. In Substance, The Severability Issue Was Decided By The District Court.

Having been presented on the one hand with specific arguments by the Appellants that the District Court's remedy should be limited solely to the voting features of § 37-7-611 and, on the other hand, with the Appellees' request that the statute be enjoined its entirety, the District Court denied the

Appellants' Motion for Remedy. J.S. App. 1a. This holding is entirely appropriate because the voting change in issue is the provision in § 37-7-611 that mandates the automatic expansion of school district boundary lines after an annexation by the district's parent city.

In fact, the Appellants' proposed remedy, under which newly annexed residents would be precluded from voting in county school board elections, even though they live in the county district, send their children to county schools and pay taxes to support the county schools, does not take into account this voting change. The Justice Department has consistently viewed the change in school boundary lines to be the central focus of this case. J.S. App. 183a, 217a. In its 1992 brief on appeal, the United States concluded that "[t]he voting change effected by [the repeal of § 37-7-611]--the repeal of the automatic annexation provision of Section 37-7-611--was not identified in the 1986 submission." Brief of United States as Amicus Curiae at 15, Dupree vs. Moore, 117 L. Ed. 2d 609 (No. 90-1977). The three-judge panel and the State have viewed the automatic extension provision as the voting change in issue. J.S. App. 6a, 61a-63a, 164a.

The United States suggests the District Court's decision was affected by the knowledge that the movement of school district boundary lines in this case would be determined by the federal court supervising Hattiesburg's desegregation decree. See Br. at 17 n.8. Precisely because of the presence of the federal court's supervisory authority over the district's desegregation decree, the Appellees have not asked that the three-judge District Court hearing this Voting Rights action move school boundary lines. But, by moving school district boundary lines, the three-judge panel would not exceed its authority because, as noted above, the voting change in issue concerns school boundary lines.

By failing to comply with the Voting Rights Act, the State is precluded from enforcing the repeal of the automatic extension provision in § 37-7-611. Thus, but for the existence of the Hattiesburg District's desegregation decree, the three-judge panel could order that school boundary lines be moved. This remedy, more than the remedy pressed by the Appellants, serves the purposes of the Voting Rights Act.

Moreover, the Appellants' proposed remedy would paradoxically bring about the very result condemned by the Justice Department as racially discriminatory. In his March 31, 1989 objection letter, the Attorney General concluded that "the repeal of Section 37-7-611, by allowing for annexations to cities without the concomitant expansion of municipal school district boundaries, is likely to create a class of city voters (for the most part predominantly white) who will not reside in the city school system yet may vote for the city governing body which under Mississippi law, appoints the city school board." J.S. App. 185a.

The determination of the appropriate remedy in this case confirms the Court's view that in Voting Rights Act cases the "local district court is in a better position than this Court to fashion relief, because the district court is more familiar with the nuances of the local situation." Clark vs. Roemer, 500 U.S. at 659. In addition, the District Court's remedy here "implements the mandate of § 5 in the most equitable and practicable manner and with least offense to its provisions." Id. at 660.

## IV. Conclusion

This litigation among several public bodies in Mississippi is now well into its fifth year. This appeal is the third trip to this Court. With deference to the United States, remand is unnecessary because the District Court has already

been presented with the substantive issue the United States contends should be addressed on remand. The Appellees respectfully request that this Court summarily affirm the judgment of the District Court.

RESPECTFULLY SUBMITTED,

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